LEE KIM NOOR & ANOR v. JULIAN CHONG SOOK KEONG & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ZABIDIN MOHD DIAH JCA
S NANTHA BALAN JCA
LEE HENG CHEONG JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-1352-07-2019]
21 JULY 2021

TORT: *Negligence – Duty of care – Solicitors – Breach – Preparation of sale and purchase agreement – Failure to conduct land search – Action filed against solicitors 11 years from date of execution of sale and purchase agreement – Whether six years stated in s. 6 of Limitation Act 1953 runs from date cause of action accrued or when damage is suffered – Whether cause of action arose on date when sale and purchase agreement executed – Whether claim time-barred*

LIMITATION: *Action – Cause of action – Accrual – Whether six years stated in s. 6 of Limitation Act 1953 runs from date cause of action accrued or when damage is suffered*

The respondents ('plaintiffs') executed a sales and purchase agreement ('SPA') to purchase a piece of land ('said property') from the developer. The SPA was printed by the developer, executed by the plaintiffs and forwarded to the appellants ('defendants') for stamping on 22 April 2004. At that material time, the defendants did not conduct a land search of the said property and the SPA did not state that the said property was charged to any bank as the column for 'name of bank/financier' in the SPA was left blank. The plaintiffs paid the final purchase price of the said property to the developer on 26 May 2004. On 2 September 2014, the plaintiffs received a letter from Bank Islam Bhd, who was the chargee of the said property, demanding the plaintiffs pay the redemption sum of RM900,000 in order to redeem the said property. Hence, the plaintiffs initiated the present action against the defendants. The High Court, *inter alia*, held that the defendants owed a duty of care to the plaintiffs as their solicitors and that the defendants were negligent, based on the conduct of the parties in the transaction. The High Court also identified three main breaches of duty of care by the defendants (i) in the preparation of the SPA; (ii) in the failure to conduct a land search; and (iii) in the deliberate cover up of negligence for many years. The High Court granted judgment in favour of the plaintiffs and ordered the defendants to pay damages to the plaintiffs. Hence, the defendants appealed. The defendants contended that the High Court had erred in law and in fact in completely failing to consider and address the defendants' defence that the plaintiffs' claim was time-barred by s. 6 of the Limitation Act 1953. The plaintiffs, however, submitted that their claim for negligence was not time-

barred as there were several instances of negligence committed by the defendants, stretching from 2004 until 2012. Further, the plaintiffs submitted that they only suffered actual loss in the year 2013/2014 when Bank Islam Bhd issued the formal foreclosure notice and demanded for a redemption sum of RM900,000 for the said property in 2014. The plaintiffs argued that a cause of action based on negligence accrued only when damage was suffered.

Held (allowing appeal)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) In the context of the factual matrix of the present suit, the six years stated in s. 6 of the Limitation Act 1953 starts to run from the date the cause of action accrued and not when the plaintiffs discovered the damage. The alleged negligence of the defendants would have occurred when the plaintiffs executed the SPA on either 6 April 2004 or 22 April 2004 as at that particular point of time, the column of bank/financier was left blank by the defendants and thus the defendants were in breach of their duty as the solicitors for the plaintiffs. The period of limitation could be said to have begun to run only from the first clear and unequivocal threat to the plaintiffs' right to purchase the said property, free from all liens and encumbrances, arising from the defendants' breach of their duty of care, to conduct a land search on the said property and to ensure that the column of bank/financer in the SPA was filled in. Thus, the plaintiffs would have suffered damage the moment the SPA was executed as the plaintiffs would have contracted to purchase a property, which was encumbered with a charge and which charge was not reflected in the SPA, thereby placing the plaintiffs in a position of detriment. Hence, the plaintiffs' cause of action arose on the date when the plaintiffs executed the SPA which was either on 6 April 2004 or 22 April 2004. (paras 36, 41 & 42)

(2) Since the plaintiffs' cause of action for the tort of professional negligence against the defendants arose on either 6 April 2004 or 22 April 2004, the plaintiffs must bring a claim on tort against the defendants, before the year 2010 which was within six years from the date of the cause of action. However, the plaintiffs had only filed this suit in 2015 which was 11 years from the date when the cause of action accrued. Even if the plaintiffs' cause of action for tort did not arise on the date when the plaintiffs executed the SPA, the cause of action for the tort of professional negligence would have accrued on the date when the plaintiffs paid the full purchase price for the said property, which was on 26 May 2004, as the plaintiffs would have suffered damage by virtue of being owners of a property which was encumbered with a charge,

thereby placing the plaintiffs in a position of detriment. Either way, the plaintiffs' claim under tort was time-barred as the suit was only filed on 28 July 2015. (paras 43-45)

Case(s) referred to:
AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
Bell v. Peter Browne & Co (A Firm) [1990] 3 All ER 124 ***(refd)***
First National Commercial Bank PLC v. Humberts [1995] 2 All ER 673 ***(refd)***
Forster v. Outred & Co (a firm) [1982] 2 All ER 753 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Goh Kiang Heng v. Mohd Ali Abd Majid [1997] 4 CLJ Supp 320 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Malsa Ideal Sdn Bhd v. Jayasuriya Kah & Co [2012] 1 LNS 934 CA ***(refd)***
Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***
Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors [2010] 1 LNS 370 HC ***(refd)***
Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82 CA ***(refd)***
Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Tunku Dato' Sri Iskandar Tunku Abdullah v. Ahmad Kamil Abdullah & Ors [2009] 6 CLJ 359 HC ***(refd)***
Vista Specialist Eye Centre Sdn Bhd v. Dato' Loo Son Yong & Another Appeal [2016] 1 LNS 1127 CA ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1)(a), 29

For the appellants - M/s Mureli Navaratnam
For the respondents - M/s Shariffah, Ooi & Co

[Editor's note: Appeal from High Court, Penang; Civil Case No: PA-22NCVC-166-08-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] This is an appeal by the appellants/defendants against the Penang High Court's decision dated 25 June 2019 which allowed the plaintiffs/respondents' claim and ordered that the appellants/defendants pay the respondents/plaintiffs, the sum of RM1,500,000 with an interest rate of 5% per annum on the sum of RM1,500,000 calculated from 27 May 2015 until full settlement; and cost of RM100,000.

[2] The respondents/plaintiffs filed a legal action on 28 July 2015 against the appellants/defendants for professional negligence and negligent misstatement. On 25 June 2019 the learned High Court Judge allowed the respondents/plaintiffs' claim. The appellants/defendants then filed the present appeal.

[3] For ease of reference, the parties herein will be referred to as they were in the proceedings before the High Court.

[4] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal with costs. This judgment explains why we allowed the appeal.

The Salient Facts

[5] The plaintiffs executed a sales and purchase agreement dated 22 April 2004 ("SPA"), to purchase a piece of land described as Plot 32 at Krystal Garden ('the said property') from Reka Mesra Sdn. Bhd. ("the developer") and also a construction agreement bearing the same date, for the construction of building a house on the said property. There is no dispute or issue with the construction agreement. What is in dispute before us, is the SPA.

[6] The SPA was printed by the developer, executed by the plaintiffs on 6 April 2004 and forwarded to the defendants for stamping on 22 April 2004. At that material time, the defendants did not conduct a land search of the said property and the SPA did not state that the said property was charged to any bank as the column for "name of bank/financier" in the SPA was left blank.

[7] The plaintiffs paid the final purchase price of the said property to the developer on 26 May 2004.

[8] On 2 September 2014, the plaintiffs received a letter from Bank Islam Bhd, who is the chargee of the said property, demanding the plaintiffs to pay the redemption sum of RM900,000 in order to redeem the said property.

[9] Hence the plaintiffs initiated the present action against the defendants.

Findings Of The High Court

[10] The learned High Court Judge *inter alia* held that the defendants owed a duty of care to the plaintiffs, as their solicitors and that the defendants were negligent, based on the conduct of parties in the transaction. The learned High Court Judge also identified three main breaches of duty of care by the defendants which are as follows, firstly, in the preparation of the SPA, secondly, in the failure to conduct a land search and thirdly, in the deliberate cover up of negligence for many years.

[11] The learned High Court Judge granted judgment in favour of the plaintiffs and ordered the defendants to pay damages to the plaintiffs.

The Defendant's Contentions Before This Court

[12] The defendants contended that the learned High Court Judge had erred in law and in fact in allowing the plaintiffs' claim based on the following:

(i) The learned High Court Judge had erred in law and in fact in completely failing to consider and address the defendants' defence that the plaintiffs' claim is time barred by s. 6 of the Limitation Act 1953;

(ii) The learned High Court Judge had erred in law and in fact in failing to determine that the defendants were actually acting as the developer's solicitor instead of the plaintiffs' solicitor and therefore, the defendants owe no duty of care to the plaintiffs;

(iii) The learned High Court Judge had erred in law and in fact in failing to consider the three-fold test provided in the Federal Court case of *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 when deciding whether the defendants owe a duty of care to the plaintiffs since the defendants were not the plaintiffs' solicitor;

(iv) The learned High Court Judge had erred in law and in fact, in failing to determine that there is no breach of duty of care by the defendants;

(v) The learned High Court Judge had erred in law and in fact in granting the quantum of damages to the plaintiffs, in the sum of RM1,500,000 with an interest rate of 5% per annum calculated from 27 May 2015 until full settlement and cost of RM100,000 and also failed to determine that the plaintiffs had not suffered any actual loss, when there were no evidence to support the same.

The Plaintiffs' Contentions Before This Court

[13] The plaintiffs in turn, contended as follows:

(i) That the defendants left the specific section provided for the details of "name of bank/financier" in the SPA schedule for chargee, blank;

(ii) The particulars of charge in the SPA are an essential part of the SPA which the defendants omitted to state. The importance of the particulars of the charge is *ipso facto* highlighted in para. 1.2.9 of the first and second schedules of the SPA itself where it states 'The first and second schedules hereto shall form part of this agreement and shall be taken to read and construed as an essential part of this agreement'; and

(iii) At the material time, the developer had in fact charged the property to Bank Islam Bhd on 15 April 2004, months before the signing of the SPA. The defendants' failure to state the correct or any particulars of the chargee is negligent misstatement which is the first alleged act of negligence of the defendants.

[14] The plaintiffs also contended that the defendants admitted that it could not prove that a land search of the said property with the land registry was conducted prior to the preparation of the SPA. This failure to do a simple land search is the second alleged act of negligence of the defendants.

[15] The plaintiffs contended that from year 2009 until 2012, the defendants communicated with the plaintiffs and made all attempts to cover up that there was an error in the SPA. In 2012, the defendants even tried to pacify the plaintiffs by stating that the fact that the said property, being charged to Bank Islam Bhd., 'could be incorrect'. Instead of owning up and rectifying the problem, the defendants tried to shift the blame, even to the extent of alleging fraud or an 'inside job' against Bank Islam Bhd.

[16] When the defendants found out about their error in the SPA in 2010, it was still not too late to rectify the problem as the developer was still in existence and solvent then. The defendants could have obtained a simple discharge letter from the developer, discharging the said property from Bank Islam Bhd. Unfortunately, the defendants only verbally discussed this with the developer. Eventually, the developer was wound up on 15 June 2011. If the defendants have rectified the problem in 2009 and 2010, the plaintiffs could have still saved the said property. This cover up is the third alleged act of negligence of the defendants.

[17] The plaintiffs contended that their claim for negligence is not time barred as, there were several instances of negligence committed by the defendants, as found by the High Court, stretching from 2004 until 2012.

The Law

[18] It is trite law that the specific finding of facts by the learned High Court Judge as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: See *Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577 (FC) paras. 41-48.

[19] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 the Court of Appeal held as follows:

> … an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

[20] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[21] Bearing in mind, the above principles distilled from the above authorities, we will now consider the defendants' appeal.

Findings Of This Court

[22] One of the defendants' main defence and contentions before us and the learned High Court Judge relates to s. 6 of the Limitation Act 1953. We are in agreement with the defendants' contention that the learned High Court Judge had failed to address this issue raised by the appellants, in her grounds of judgment notwithstanding that the issue of limitation was profoundly submitted by both the defendants and the plaintiffs.

[23] Having read and considered the written and oral submissions of learned counsels for the defendants and the plaintiffs, we find that the only issue which merits our consideration is whether the plaintiffs' claim against the defendants is time barred, which the learned High Court Judge has failed or omitted to consider at all.

[24] It is the defendants' pleaded defence that the plaintiffs' claim is time-barred by virtue of the statutory provisions of s. 6(1) of the Limitation Act 1953 which provides that:

> 6. Limitation of actions of contract and tort and certain other Actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) **Actions founded on a contract or on tort;**
>
> (emphasis added)

[25] The plaintiffs contended that the defendants were negligent in preparing the SPA, by failing to state that the said property is encumbered with an existing charge and in the manner the defendants handled the problem after the discovery of the problem. The plaintiffs were led to assume

A that the said property was unencumbered and suffered loss when years later, Bank Islam Bhd., the chargee of the charge, came to foreclose the said property after the developer/chargor was wound up.

[26] As stated earlier, it is the contention of the plaintiffs that their claim for negligence is not time barred as, there were several instances of B negligence committed by the defendants, as found by the High Court, stretching from 2004 until 2012. Further, the plaintiffs submitted that they only suffered actual loss in year 2013/2014 when Bank Islam Bhd issued the formal foreclosure notice and demanded for a redemption sum of RM900,000 for the said property in 2014.

C **[27]** The plaintiffs argued that a cause of action based on negligence accrues only when damage is suffered as laid down in *Tunku Dato' Sri Iskandar Tunku Abdullah v. Ahmad Kamil Abdullah & Ors* [2009] 6 CLJ 359 and *Malsa Ideal Sdn Bhd v. Jayasuriya Kah & Co* [2012] 1 LNS 934.

D **[28]** The plaintiffs took the position that when the SPA was prepared negligently by the defendants in 2004, the plaintiffs did not suffer actual loss upon their execution of the same. The plaintiffs only suffered damage and actual loss, arising from the defendant's negligence, when Bank Islam Bhd., through its solicitors, issued a notice to foreclose *via* a letter dated E 14 November 2013 and/or when Bank Islam Bhd issued a formal foreclosure notice to the plaintiffs to redeem property, requiring them to pay the sum of RM900,000 *vide* notice dated 2 September 2014. Since their present suit was filed on 28 July 2015, it is well within the limitation period of six years from their actual loss and damage *vide* the foreclosure notice.

F **[29]** The plaintiffs also contended that if they filed a suit for negligence for damages against the defendants before Bank Islam Bhd commenced foreclosure proceedings or exercised its rights as a chargee, then such a claim may fail as it will be a claim for damages for prospective or potential loss and not actual loss. The plaintiffs relied on the decision of this court in *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal* [2020] G 5 CLJ 82, where it was held "… In negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which caused the damage …'

[30] The plaintiffs also relied on the High Court case of *Goh Kiang Heng* H *v. Mohd Ali Abd Majid* [1997] 4 CLJ Supp 320 which followed and cited with approval, the English authorities of *First National Commercial Bank PLC v. Humberts* [1995] 2 All ER 673 and *Bell v. Peter Browne & Co (A Firm)* [1990] 3 All ER 124 which held:

I

> … actionable actual loss (as opposed to a mere potential for loss) occurred only when the insured was called on by a third party to make payments against which it would have been entitled to be indemnified by the insurer under the contract as represented …
>
> When the events entitling the third party to make the demand for payment occurred and when the insurer indicated, prior to the making of that demand, that it would not indemnify the insured against any such demand, there was no more than a potential for loss …

[31] In the light of the conflicting stands taken by the parties herein, it would be necessary to determine when the causes of actions for the plaintiffs' case accrued.

Accrual Of Cause Of Action In Tort

[32] In the present case, the basis of the plaintiffs' claim against the defendants relates to the defendants' negligence in leaving the column of bank/financier in the SPA, blank and in failing to conduct a land search of the said property. Thus, the plaintiffs' case which is grounded on the tort of negligence here is one that revolves on the defendants' purported negligence in the preparation of the SPA which was executed on 6 April 2004.

[33] We are of the considered opinion that a cause of action in tort arises when the plaintiffs suffered damage. The issue of when the cause of action for a tort arises, was dealt with, in *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [20101 3 MLJ 784 where the Court of Appeal held that:

> [34] It is trite law that a **cause of action founded in tort accrues when the appellant suffers damage** (*Goh Kiang Heng v. Hj Mohd Ali bin Hj Abd Majid*).
>
> [35] According to the case of *Forster v. Outred & Co (a firm) [1982] 1 WLR 86 (CA), it was necessary to prove actual damage in order to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the loan until the demand was made* and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed. (emphasis added)

[34] Further, reference and support can be found in the English case of *Forster v. Outred & Co. (a firm)* [1982] 2 All ER 753 where the English Court of Appeal deliberated and found as follows:

> The cause of action in negligence requires not only carelessness by the defendant but also for damage to have been suffered by the plaintiff. So the question in this case is; when did the plaintiff suffer damage?

A …

Under the express terms of the mortgage the plaintiff was under no liability to the mortgagees for repayment of her son's overdraft and the mortgagees could not exercise their power of sale of the mortgaged property until demand has been made under the mortgage. But does that B mean no damage was suffered by the plaintiff until there had been a demand (as was submitted by the counsel for the plaintiff)?

(emphasis added)

I approach this case on the basis that it is sufficient that it is financial loss that should be foreseen, and I would hold that in cases of financial or economic loss the damage crystallises and the cause of action is complete at the date when the plaintiff, in C *reliance on negligent advice, acts to his detriment.*

In *Sykes v. Midland Bank Exor and Trustee Co Ltd* [1969] 2 All ER 1238, [1969] 2 QB 518; on appeal [1970] 2 All ER 471, [1971] 1 QB 113 *the damage crystallised when the plaintiff in reliance on the negligent advice, executed the lease. It may be that at that time the plaintiff had not paid any money, but it is sufficient* D *if he has suffered some loss capable of quantification in terms of money:* see *Simple Simon Catering Ltd v. Binstock Miller & Co* (1973) 228 EG 527 …

In this case, as soon as she executed the mortgage the plaintiff not only became liable under its express terms but also, and more importantly, the value of the equity of redemption of her property was reduced. Before she executed the mortgage deed she E *owned the property free from incumbrance; thereafter she became the owner of a property subject to a mortgage.* That, in my view, *was quantifiable loss and as from that date her cause of action against her solicitor was complete, because at that date she had suffered damage.* The actual quantum of damages would, of course, depend on events between that date and the date when the damages had finally to be assessed, *but the cause of action was complete when* F *she executed the mortgage,* without proof of special damage. I would therefore hold that the cause of action accrued on 8 February 1973 and the time had expired by the date of the issue of the second writ. For these reasons and for the reasons given by Stephenson LJ I, too, would dismiss the appeal. (emphasis added)

G **[35]** Section 6(1)(a) of the Limitation Act 1953 is mandatory provision which must be strictly observed. This is laid down in the case of *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] 1 LNS 370; [2010] 9 MLJ 603 at p. 603 where the High Court held as follows:

The **period of limitation as contained in s. 6(1)(a) of the Act is** H **mandatory and must be strictly observed** unless there are sufficient facts to bring it within the exception as provided under s. 29(b) of the Act, which is not the case in the present case. (emphasis added)

[36] We are also of the considered opinion that in the context of the factual matrix of the present suit, the six years as stated in s. 6 of the Limitation Act I 1953 starts to run from the date, the cause of action accrues and not when the plaintiffs discovered the damage. We find support in *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors supra*, where Abdul Malik Ishak JCA held:

So the position, in Malaysia, remains the same and that would be that **limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.**

(emphasis added)

[37] Further, Abdul Malik Ishak JCA in the same case, compared our Limitation Act 1953 with the UK Limitation Act 1939. This is what he said:

[20] At this juncture, it is ideal to see how s. 2(1)(a) of the UK Limitation Act 1939 is worded. We will now reproduce that section *verbatim*:

2(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) actions founded on simple contract or on tort;

[21] It is certainly similar to our s. 6(1)(a) of the Limitation Act 1953. Now, s. 2(1)(a) of the UK Limitation Act 1939, as reproduced above, merely provides that actions founded on simple contract or tort shall not be brought after the expiration of six years "from the date on which the cause of action accrued". The English cases have interpreted this to mean that time began to run whether or not damage was discovered.

[22] Since the damage is not apparent at the time the cause of action accrues, the result would certainly be harsh. This is best illustrated by the House of Lords case of Cartledge (Widow And Administratrix Of The Estate Of Fred Hector Cartledge (deceased)) And Others v. E. Jopling & Sons, Ltd [1963] 1 All ER 341. In *Cartledge*, there were seven claims brought by steel dressers formerly employed by the defendant. The plaintiffs alleged that in the course of their employment, they were wrongly exposed to dust for periods from 1939 to 1950 and this exposure caused them to contract pneumoconiosis, a disease which slowly accrued and progressively damaged their lungs without their knowledge. According to the evidence that was led, a man susceptible to pneumoconiosis who inhaled noxious dust over a period of years would have suffered substantial injury before the injury can be discovered. The House of Lords held that the cause of action was time-barred because on the true construction of s. 2(1)(a) of the UK Limitation Act 1939, time did not run from the date when the plaintiffs knew or ought to have known that they were suffering from pneumoconiosis, but from the date when the cause of action accrued. On the facts of the case, the cause of action accrued before October 1950 when the plaintiffs suffered damage as a result of inhaling the dust although they were ignorant of the damage. *The House of Lords in their judgment recognised the harshness of s. 2(1)(a) of the UK Limitation Act 1939 when Lord Reid held at p. 343 of the report that:*

It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered

by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.

…

[23] Briefly, Cartledge lays down the principle that limitation period runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage.

[24] … Section 11 of the UK Limitation Act 1980 provides for a special time limit of three years in personal injury cases. Under this provision, the time period runs from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. This new provision overcomes the harshness of Cartledge in the context of personal injury cases. For ease of reference, we will now produce s. 11 of the UK Limitation Act 1980:

…

[25] … The House of Lords held that the action was time-barred. Lord Fraser of Tullybelton said at p. 72 of the report:

> *I am respectfully in agreement with Lord Reid's view expressed in Cartledge v. Jopling that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it.*

[26] …

[27] The English Parliament took heed and changed the law after the decision in *Pirelli*. And the UK Latent Damage Act 1986 was enacted to remedy the harshness. …

…

[28] Limitation, under s. 14A of the UK Limitation Act 1980, only begins to run either six years from the date on which the cause of action accrues or three years from the "starting date", if the three years period expires later. "Starting date" is defined in s. 14A(5) of the UK Limitation Act 1980 to mean the "earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action." It is now crystal clear that s. 14A(5) of the UK Limitation Act 1980 caters for negligent actions where the facts relevant to the cause of action are not known on the date of accrual of the cause of

action. Limitation only runs from the date the plaintiff has knowledge of the facts relevant to the cause of action. However, there is no similar or equivalent amendment to our Limitation Act 1953. So the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage. (emphasis added)

[38] We take note of the aforesaid portion of the judgment of Abdul Malik Ishak JCA, and agree with what he said in para. [28] of his grounds of judgment in *AmBank (M) Bhd v. Abdul Aziz bin Hassan & Ors supra*, when he held that since there was no similar or equivalent amendment to our Limitation Act 1953 as in the UK Limitation Act 1980, "the position, in Malaysia, remains the same and that would be that limitation runs from the date on which the cause of action accrues regardless of whether the plaintiff discovers the damage."

[39] Furthermore, in *Vista Specialist Eye Centre Sdn Bhd v. Dato' Loo Son Yong And Another Appeal* [2016] 1 LNS 1127; [2016] 5 MLJ 832, Rohana Yusuf JCA (as she then was), referred to *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors, supra* and adopted the decision of the case. This is what she held:

[8] … In our view the above provision is clear that the computation of 6 years limitation must run from the date the cause of action arose and not from the date the alleged negligence was so discovered. If any further authority is required to explain the clear provision of the law we would refer to the decision of this Court in *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663. In interpreting section 6(1) it was held in that case that the cause of action by the Bank accrued and began to run from the alleged date of breach and not on the date such breach was discovered.* The Court further held in *Ambank (M) Bhd* that even though section 29 allows postponement of the limitation period until discovery of the cause of action, it only applies in cases where the cause of action is based upon fraud or a mistake or is concealed by fraud. *The Court in fact referred and adopted the decision of the House of Lords in Cartledge v. Joping [1963] 2 WLR 210 in interpreting section 2(1)(a) of the UK Limitation Act 1939. The section contains similar provision to that of section 6(1) of the Limitation Act. Cartledge laid down the principle that limitation period runs from the date on which the cause of action accrues regardless of discovery of damage. This position in United Kingdom had however changed as a result of the passing of the Limitation Act 1980.*

[9] …

[10] Having considered the above cases in our view *the learned High Court Judge had fallen into error in his judgment to have found that the cause of action in this case may have accrued not on the date of the surgery itself but could be the date the damage was discovered.* Since the legal position on the application of limitation is clear we find no reason for this claim to proceed to a full trial. (emphasis added)

[40] In the present case, based on the plaintiffs' pleaded case, it was the duty of the defendants as the solicitors for the plaintiffs to conduct a land search on the said property and to ensure that the column of bank/financier in the SPA was filled in and the defendants failed to do so.

[41] Therefore, we are of the considered opinion that the alleged negligence of the defendants would have occurred when the plaintiffs executed the SPA on either 6 April 2004 or 22 April 2004 as at that particular point of time, the column of bank/financier was left blank by the defendants and thus the defendants were in breach of their duty as the solicitors for the plaintiffs. The period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiffs' right to purchase the said property, free from all liens and encumbrances, arising from the defendants' breach of their duty of care, to conduct a land search on the said property and to ensure that the column of bank/financier in the SPA was filled in.

[42] Thus, the plaintiffs would have suffered damage, the moment the SPA was executed as the plaintiffs would have contracted to purchase a property which is encumbered with a charge and which charge is not reflected in the SPA, thereby placing the plaintiffs in a position of detriment. Hence, the plaintiffs' cause of action in the present case arose on the date when the plaintiffs executed the SPA which is either on 6 April 2004 or 22 April 2004.

[43] Since the plaintiffs' cause of action for the tort of professional negligence against the defendants arose on either 6 April 2004 or 22 April 2004, the plaintiffs must bring a claim on tort against the defendants, before the year 2010 which is within six years from the date of cause of action. However, in the present case, the plaintiffs had only filed this suit in 2015 which is 11 years from the date when the cause of action accrued.

[44] We also find that even if the plaintiffs' cause of action for tort does not arise on the date when the plaintiffs executed the SPA, the cause of action for the tort of professional negligence would have accrued on the date when the plaintiffs paid the full purchase price for the said property, which is on 26 May 2004 as the plaintiffs would have suffered damage by virtue of being owners of a property which is encumbered with a charge, thereby placing the plaintiffs in a position of detriment.

[45] Either way, we are of the considered opinion that the plaintiffs' claim under tort is time barred as the suit was only filed on 28 July 2015.

[46] We noted that the plaintiffs did not plead and rely upon s. 29 of the Limitation Act 1953, which allows for a postponement of the limitation period until the discovery of the cause of action. However, it is only applicable in respect of cases where the cause of action is based upon fraud

or a mistake or is concealed by fraud. Clearly, s. 29 of the Limitation Act 1953 was not applicable here as fraud or mistake was not even pleaded by the plaintiffs and the parties were bound by their pleadings.

Conclusion

[47] Premised on the reasons enumerated above, we find that there are merits in the appeal. The appeal is hereby allowed with cost and the decision of the High Court dated 13 August 2019 is set aside.